Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 88-1504

Michelle M. Etlin, Petitioner,

v.

Vladimir N. Etlin, Respondent.

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE INTERMEDIARY COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

Michelle M. Etlin, pro se
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May 8, 1989

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 1 of the U.S. Constitution provides, in pertinent part:

"Full faith and credit shall be given in each State to the...judicial Proceedings of every other State."

28 U.S.C. 1738A provides, in pertinent part:

[See Supplemental Appendix, p. i]

The Fourteenth Amendment to the U.S. Constitution, Section 1 provides, in pertinent part:

"No state shall ... abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

As mentioned in the Petition, the custody decree entered on March 4, 1988 nunc pro tunc June 2, 1982 was appealed to the Court of Appeals of Virginia on the grounds that the Circuit Court lacked jurisdiction to make it and had no legal basis to remove, replace, modify, supersede, or in any way disturb the valid custody decree already entered. [See Supplemental Appendix, pp. ii-v.] The Father's brief merely asserted that the issue of whether or not the court lacked jurisdiction was **moot**, which mother denied. [See Supplemental Appendix, pp. v-vi.] Her claim to back child support remained in active controversy; also the mother remained under suspended sentence for criminal contempt of the order, so its validity was still in controversy.

Another effect the mother identified which still flowed from the June 2, 1982

decision was that the court had exercised "continuing jurisdiction" in 1987. She argued that she was deprived of due process if jurisdiction could "continue" from a point at which it did not exist. U.S. Constitution, Fourteenth Amendment.

Between the filing of the Petition and now, a new development occurred: the Court of Appeals (to which certiorari is requested) affirmed the nunc pro tunc order by an extraordinary feat of irrationality. First, granting that the reduction of child support **was** still in controversy, it disposed of that issue by saying such reduction was not proven "plainly wrong." Turning to jurisdiction second, as if invalidity of an order did not affect trial court discretion, it held the rest of the order moot and thus affirmed; rehearing was denied. [See **Supplemental Appendix**, pp. vi-vii.]

ADDITIONAL REASONS TO GRANT THE PETITION

I. The Voidness of the Nunc Pro Tunc Order Proved that Virginia Lacked Jurisdiction under 28 USC 1738A

The Court of Appeals of Virginia, affirming the trial court, said it had jurisdiction pursuant to 20-126(A)(2), or "significant connections." Even if that were so, Virginia state law could not by itself give rise to jurisdiction to decree concerning a child living in Oregon for four years. Virginia could only decree in 1987 if it had "continuing jurisdiction" pursuant to 28 USC 1738A.

Continuing jurisdiction under the Federal Act is predicated upon, and corollary to, full faith and credit to custody decrees. U.S. Constitution, Article IV, Section 1. Ever since May v. Anderson, 345 U.S. 528, 73 Sup. Ct. 840 (1953), this Court has questioned full faith and credit for custody decrees, which are inherently non-final. However,

28 USC 1738A has provided the constitutional groundwork for full faith and credit to such decrees: compliance with the jurisdictional prerequisites of the Act.

In other words, if a state exercises jurisdiction in accordance with 28 USC 1738A, and thereby makes its decree in compliance with that Act, then its decree qualifies for full faith and credit out of state. Furthermore, if that custody decree does qualify for full faith -and credit out of state, the Decree State that made it can qualify for continuing jurisdiction to decree again. This relationship between full faith and credit for custody orders, and continuing jurisdiction for the courts of the decree state, is the foundation of 28 USC 1738A. Rendition of custody decrees contrary to the requirements of the Federal Act cannot lead to the continued right to decree pursuant to that same Act.

In the petition for certiorari, the mother asserted that, because Virginia could not satisfy its own statutory jurisdictional requirements, it could not assume jurisdiction under the Federal Act. She points out here in addition that Virginia could not, in 1987, continue to have jurisdiction which it lacked five years earlier, when it made orders which violated 28 USC 1738A.

From and after June 2, 1982, the date of the nunc pro tunc decision, Virginia did not have jurisdiction over the subject matter of Daniel Etlin's custody. According to 28 USC 1738A:

> "The jurisdiction of a court of a State which **has made a child custody determination** consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met **and** such State remains the residence of the child or of any contestant.

That does not apply to Virginia, which made a child custody determination in-

consistently with the provisions of the Federal Act in 1982, thereby depriving itself of jurisdiction to continue ruling. Templeton v. Witham, 595 F.Supp. 770 (S.D.Ca. 1984) vacated on other grounds, 805 F.2d 1039 [1]. (In Templeton, the Court held that rendition of a custody order which violated the terms of 28 USC 1738A caused a mandatory **lapse** of jurisdiction for the Decree State.)

The importance of this nexus cannot be overestimated, in assessing the public interest and this Court's interest in upholding and interpreting the Federal Act. That Act attempts to provide jurisdictional integrity for custody decrees to limit inappropriate and unnecessary exercises of jurisdiction to disturb valid

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1/ Templeton was vacated by the Ninth Circuit not on the merits of the decision but because, ever ahead of its time, the Ninth Circuit correctly perceived that 28 USC 1738A did not give rise to a private cause of action in federal court.

custody decrees. The fact that it is used as often to justify such proceedings as to prevent them has led to a situation so chaotic that this Court should exercise jurisdiction to define the Federal Act's requirements. Although Etlin v. Etlin is an atrocious individual case, it is not its atrocity that merits U.S. Supreme Court certiorari, but the fact that it presents an ideal opportunity for this Court to make important public policy statements which will help the several states. As bizarre and convoluted as the procedural elements of Etlin are, it is not a mere aberration; it is just the "worst case" among many of the same species begging for the guidance of U.S. Supreme Court review.

II. The Issues are Far-Reaching

A U.S. Supreme Court decision in this case can affect more of America's population than any case before the

Court for years--with the sole possible exception of the abortion issue. "War of Attrition" litigation is becoming a common state court phenomenon, aggravated, rather than ameliorated, by 28 USC 1738A--because the Act is being misapplied.

Cases like Etlin are actually quite common (minus some of the more peculiar procedural anomalies such as the lawsuit against the judge and the four pro se trips the father made in forma pauperis to this Court). Such abusive lawsuits are analogous to iatrogenic illnesses--one could call them "lexogenic litigations"--and they are ever on the rise.

CONCLUSION

The recent development--the illogical action of the Virginia Court of Appeals in refusing to vacate a void custody decree--adds weight to the Petition to this Court to review that court's treatment of an important mis-

application of 28 USC 1738A. The constitutional violations are even more egregious, and the impropriety of Virginia's exercise of jurisdiction even more apparent, in light of the nunc pro tunc 1982 order's invalidity--not just under state law, but under 28 USC 1738A.

The fact that Virginia did exactly what the Federal Act was enacted to prevent, and then presumed to exercuse "continuing jurisdiction" to do it again five years later, is a glaring example of the problems arising in state appellate courts absent U.S. Supreme Court attention.

Respectfully submitted,

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Dated: May 8, 1989

SUPPLEMENTAL APPENDIX

28 USC 1738A provides as follows, in pertinent part:

§ 1738A. Full faith and credit given to child custody determinations.

(a) The appropriate authorities of every State shall enforce according to its terms and shall not modify except as provided in subsection (f) of this section, any child custody determination made consistently with the provisions of this section by a court of another State.

* * *

(c) A child custody determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

* * *

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) The jurisdiction of a court of a State which has made a child custody determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

(e) Before a child custody determination is made, reasonable notice and opportunity to be heard shall be given to the [parties].

Excerpts from Appellant's Brief in the Court of Appeals of Virginia, Record No. 0437-88-4:

"After a full ore tenus hearing, the Circuit Court (Lewis Hall Griffith, J.) awarded sole custody to Michelle ... in a permanent custody order dated February 26, 1981 (App, 15-17). Vladimir then sued Judge Griffith for $35,000 (App, 18-23), ... coerced [his] recusal by motion ... not served on Michelle (App, 24), and simultaneously disobeyed that order.

* * *

"On February 5, 1982, Vladimir filed a 'motion to set aside court order' with no petition pending pursuant to §20-108 and no jurisdictional pleading pursuant to §20-132. ... On June 1, 1982, the parties appeared ... on the father's motion to 'set aside' the permanent custody order for 'fraud on the court.'

"Vladimir alleged no change in circumstances but insisted that ... Judge Griffith had made the wrong decision ... therefore, Judge Bach must reverse him.

* * *

"... Judge Bach announced that he would hear custody, visitation and support de novo ... explaining:

'If I think the previous orders were wrong, or shouldn't have been entered, I'll change it because I think we have jurisdiction over custody and visitation.' * * * 'I'm going to [try the case again] in spite of [the mother's] technical objections ... and notice or anything else because ... custody and visitation can be reviewed and changed at any time. ...

* * *

"Judge Bach then found that there had been no fraud on the court, but he proceeded to set aside Judge Griffith's order anyway and to make his own ..."

[pages 4 - 7, Appellant's Brief.]

"In order for custody decrees to be Constitutional and to merit full faith and credit, they must be final. Yet Sec-

tion 20-108 makes it clear that they are not final. The fragile but essential characteristic of custody decrees that allows them to be final and yet changeable according to Section 20-108 is that they may only be changed if material circumstances change. It would be unconstitutional to deprive a custodial parent of the protection of a custody decree when the only thing that changed was the judge. ... If [the recusal of] Judge Griffith could deprive Michelle of the right to the protection of Judge Griffith's decree, or could force her to relitigate her entitlement under that decree, then the custody law of Virginia would automatically be unconstitutional, because it would deprive persons of equal protection and due process. [Id. at 13]

* * *

"It would deprive persons of due process and equal protection if, once a

final order was made in the Circuit Court, the order was enforceable only until the next trial, which could occur at any time, before any other tribunal, who was free to change the order and set the order aside. ... Section 20-108, if interpreted to mean that custody can be changed at any time, would ... be ipso facto unconstitutional." [Id. at 27]

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Excerpts from Appellant's Reply Brief in the Court of Appeals of Virginia, Record No. 0437-88-4:

"A void order has no legal or binding force or effect, and all proceedings based upon it are invalid. [citations omitted] If nothing were based upon the June 2 order, if there were no continuing jurisdiction, if Judge Bach had not enforced his void order both in and out of the Commonwealth, the issue of contempt of a void order would still remain.

[Reply Brief, p. 4]

"... because the original order was void, all subsequent actions based upon its effects were also void for lack of jurisdiction. ... because the initial order was void, ... continuing jurisdiction could not attach to an invalid order. [Id. at 9-10]

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V I R G I N I A :

In the Court of Appeals of Virginia on Thursday the 23rd day of March, 1989.

Michelle M. Etlin, Appellant,
against
Record No. 0437-88-4
Circuit Court No. 68775
Vladimir N. Etlin, Appellee.

Upon an appeal of right from a judgment rendered by the Circuit Court of Fairfax County on the 4th day of March, 1988, nunc pro tunc June 2, 1982.

Before Judges Hodges, Keenan and Moon

The order appealed from in this case is affirmed for the following reasons:

(1) The record before this Court fails to demonstrate that the chancellor was plainly wrong in reducing Mr. Etlin's child support obligation on June 2, 1982. Code §8.01-680.

(2) The remaining issues presented on this appeal contain no matters which remain in active controversy, and therefore, the balance of the appeal filed herein is moot.

Accordingly, the judgment is affirmed. The appellant shall pay to the appellee thirty dollars damages.

This order shall be certified to the trial court.

A copy,

Teste:

David B. Beach, Clerk

By: Deborah S.F. Uitvlucht
Deputy Clerk